

## Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies

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### Summary

*Many migrants from Southern Africa come to South Africa every year in search of a better life. This article explores the extent to which foreign African migrants are covered or excluded by the social protection regime in South Africa, using the situation of Malawian migrants as a case study. The article demonstrates that there are both normative (or formal) exclusions, as well as practical exclusions from social protection faced by these migrants. In light of this grim reality, the article explores the various survival strategies that these migrants adopt in order to hedge against the risk of socio-economic shocks. The article shows that there are well-developed informal social protection networks largely based on nationality and kinship. Another key finding in the study is that, for many migrants, the movement to South Africa is in itself a social protection measure to protect against existing or future socio-economic risks and vulnerabilities in their native state. The article suggests that the experiences of Malawian migrants in Johannesburg are similar to the experiences of foreign migrants in various metropolitan societies in Eastern and Southern Africa.*

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## 1 Introduction

South Africa, as Africa's largest economy, is the foremost migrant-receiving country in Southern Africa. Migration to South Africa has been described as a well-established household poverty-reduction strategy.<sup>1</sup> Many people from within Southern Africa, therefore, migrate to South Africa in the hope of a better life. Migrants from Mozambique, Zimbabwe, Lesotho and Malawi are said to comprise the majority of undocumented or irregular immigrants to South Africa, with their total number being estimated at between 500 000 and 1 million.<sup>2</sup> In addition to these undocumented or irregular immigrants, there are also those migrants who are legally resident in the country.

The principal question that the article examines is how migrants deal with the various socio-economic risks and vulnerabilities associated with the status of an immigrant in South Africa. In addressing this question, the article begins by setting out the theoretical framework in which the social protection regime in South Africa is grounded, which includes obligations arising from international and regional human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), yet to be ratified by the country; and the African Charter on Human and Peoples' Rights (African Charter).

In addition, the article investigates the social protection avenues and strategies that the migrants adopt in the event of social protection exclusions, and whether their migration to South Africa, by itself, is a social protection strategy. Further, the article weighs up how the migrants compare their respective experiences in Malawi and South Africa in respect of their living standards and the general level of socio-economic vulnerabilities, risks and attendant protections.

Whilst the focus of the article is on Malawians living in various parts of Johannesburg, it is evident that these migrants' experiences largely mirror the experiences of other migrant groups in South Africa. Further, a survey of available literature demonstrates that the experiences

<sup>1</sup> A Bloch 'Gaps in protection' undocumented Zimbabwean Migrants in South Africa, Forced Migration Studies Programme (Migration Studies Working Paper Series 38).

<sup>2</sup> J Crush 'South Africa: Policy in the face of xenophobia' in MPI, Country Profiles (2008) <http://www.migrationinformation.org/Profiles/display.cfm?id=689> (accessed 12 March 2009). See also G Goodwin-Gill 'International and national responses to the challenges of mass forced displacement' in J Handmaker *et al* (eds) *Advancing refugee protection in South Africa* (2008) 33, where he states that a reasonable estimate of migrants in South Africa is in the range of 1 to 2 per cent of the total population (ie between 500 000 and one million). More recently, Martin has suggested that as of 2010, South Africa was hosting between two to eight million illegal immigrants. See G Martin 'Feature: Illegal migration and the impact of cross border crime' *DefenceWeb* 9 March 2011 [http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=14001:feature-illegal-migration-and-the-impact-of-cross-border-crime&catid=87:border-security&Itemid=188](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=14001:feature-illegal-migration-and-the-impact-of-cross-border-crime&catid=87:border-security&Itemid=188) (accessed 5 April 2011).

of these migrants, including their survival strategies, are not unique to South Africa. They are common in the Eastern and Southern African region. Hence, the relevance of this study goes beyond that of the two countries, Malawi and South Africa.

## 2 Definition of social protection

In this section, a working definition of social protection for purposes of the study is adopted. Though apparently thin, there is a distinction between the concepts of social security and social protection, with the latter assuming a broader scope. The article deals with each concept in turn.

The International Labour Organisation (ILO) has done pioneering work in the field of social security. It stipulates access to basic and essential health care, income security for children, access to nutrition, education and care, a measure of social assistance to poor or unemployed persons, and ensuring income security through basic pensions for old or disabled persons as constituting what it considers a ‘basic social security package’.<sup>3</sup> It recommends that countries which have not yet achieved universal or widespread social security coverage should first aim to put in place for all residents in the country a basic and modest set of social security guarantees consisting of this basic ‘social security package’. The ILO concludes that ‘[t]his is the launching platform for a further social security development process that provides greater security when the “fiscal space” of governments increases as economies continue to develop’.<sup>4</sup>

In South Africa, the White Paper on Social Welfare provides a definition, broadly similar to that of the ILO, albeit with some conceptual differences. It defines social security as entailing<sup>5</sup>

policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs. State social assistance (grants) includes the following four categories of benefits: those associated with old age, disability, child and family care, and relief for the poor.

Whilst the ILO seems to limit social security to public measures, the South African White Paper, by referring to contributory and non-contributory schemes, proposes a definition that implies both public and

<sup>3</sup> ILO Committee on Employment and Social Policy *Social security standards and the ILO campaign for the extension of social security* GB303 ESP\_3\_[2008-10-0169-1]-En.doc (Geneva, ILO: 2008) para 14.

<sup>4</sup> As above.

<sup>5</sup> Department of Welfare ‘White paper for social welfare: principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa’ <http://www.welfare.gov.za/documents/1997/wp.htm> (accessed 12 March 2009).

private measures.<sup>6</sup> It remains unclear, however, as to whether this is the definitive position in South African law.<sup>7</sup>

Dekker makes reference to another form of social security, constituted by survival strategies adopted by those that are excluded from official social security schemes, both public and private.<sup>8</sup> She states that informal social security has only recently been identified in South Africa as a new 'strand' to the traditional concept of social security.<sup>9</sup> She goes on to state that<sup>10</sup>

[i]nformal social security arrangements rely heavily on principles of reciprocity and solidarity. Such social security does not only manifest itself in the form of monetary transfers, but can also assume the form of support and services unique to a particular group or community. Informal social security is always delivered in a specific context in which people have something in common, reflecting the principles of solidarity (*ubuntu*) and reciprocity. The most common examples of informal social security mechanisms in South Africa are stokvels and burial societies.

Thus, Dekker urges that informal social security can manifest itself in the form of neighbourhood-based mutual aid schemes developed among people within a specific community or kinship-based social security. Olivier *et al* seem to provide an even clearer and more elaborate definition of informal social security, stating that<sup>11</sup>

[i]nformal social security arrangements are those self-organised informal safety nets which are based on membership of a particular social group or community, including, but not limited to, family, kinship, age group, neighbourhood, profession, nationality, ethnic group, and so forth.

Underpinning the concept of informal social security in Southern Africa is the value of *ubuntu*. This value received judicial expression by the

<sup>6</sup> M Swart 'Social security' in S Woolman *et al* *Constitutional law of South Africa* (2006) 56D3-56D4.

<sup>7</sup> Eg, more recently, in *Law Society of South Africa & Others v Minister for Transport & Another* 2011 1 SA 400 (CC), social security has been described as public financial support for people who are poor, have a disability or are vulnerable (para 45). This is evidently a very narrow conception of social security as it ties social security to 'public financial support'. It does not extend to informal and non-pecuniary forms of social security. The narrowness, though, seems explainable from the fact that the definition of social security was not necessarily germane to the determination of the case. The point was simply made by the Minister in passing, and the case rested on other issues surrounding the Road Accident Fund in South Africa. The Constitutional Court simply adopted the Minister's submissions in this regard.

<sup>8</sup> AH Dekker 'Informal social security: A legal analysis' unpublished LLD thesis, University of South Africa, 2005 6.

<sup>9</sup> As above.

<sup>10</sup> As above.

<sup>11</sup> M Olivier *et al* 'Formulating an integrated social security response: Perspectives on developing links between informal and formal social security in the SADC region' paper presented at the EGDI and UNU-WIDER Conference on 'Unlocking human potential: Linking the informal and formal sectors' 17-18 September 2004, Helsinki, Finland.

Constitutional Court in the case of *S v Makwanyane*,<sup>12</sup> where Langalibalele J (as he then was) stated that *ubuntu*<sup>13</sup>

is of some relevance to the values we need to uphold. It is a culture which places emphasis on community and on the interdependence of members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from members of the community such person happens to be part of ... More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

Thus, Olivier observes that values such as *ubuntu*, which are all about solidarity, collective responsibility, compassion, equality, unity, self-determination, human respect and human dignity, form the basis of closely-interlaced communities that are discernible in the social, political and economic activities of Africans.<sup>14</sup> The idea of informal social protection, including social security, lies at the core of this study. Significantly, following Gsägner, Dekker states that informal social security is generally uniformly practised in East and Southern Africa.<sup>15</sup> This therefore signals that country-specific lessons, such as those to be drawn from the present study, can be extrapolated and applied to other countries in the region.

Dekker, however, goes on to caution against over-romanticising informal social security mechanisms in South Africa, stating that the system is imperfect and that, although it provides protection against certain risks, owing to the poor environment within which it functions, it only provides low level benefits and that it is not sufficiently placed to provide protection against large and long-term risks such as old age, HIV and AIDS or long-term unemployment.<sup>16</sup>

All in all, as the Committee on Economic, Social and Cultural Rights (ESCR Committee) has observed, the right to social security is of central importance in guaranteeing human dignity for all persons, particularly the most vulnerable and marginalised, when they are faced with circumstances that deprive them of their capacity to fully realise other fundamental human rights.<sup>17</sup>

Social protection as a concept has also been defined in various ways. The general view is that social protection is a wider concept than – and encompasses – social security, and that its increasing usage in rights literature owes to the difficulties presented by the narrow import of

<sup>12</sup> 1995 3 SA 391.

<sup>13</sup> *Makwanyane* (n 12 above) para 224.

<sup>14</sup> Olivier (n 11 above).

<sup>15</sup> Dekker (n 8 above) 126. See also H Gsägner 'Linking informal and formal security systems' *Deutsche Stiftung für Internationale Entwicklung* <http://www.dse.de/ef/social.gsaenger.htm> (accessed 5 April 2011).

<sup>16</sup> Dekker (n 8 above) 7.

<sup>17</sup> ESCR Committee General Comment 19: The Right to Social Security (art 9) (GC 19) UN Doc E/C.12/GC/19.

social security.<sup>18</sup> The Taylor Report, describing social protection, stated that<sup>19</sup>

[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. *Comprehensive social protection is broader than the traditional concept of social security*, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the state.

Thus, although in this article frequent references will be made to the term 'social security', the reader should keep in mind that in those instances, the term is used as a subset of the wider notion of social protection.

Swart describes social protection as incorporating 'developmental strategies and programmes designed to ensure minimum living standards for all citizens'.<sup>20</sup> It is interesting that Swart refers to all citizens rather than everyone.<sup>21</sup> Her definition, however, apart from its narrow focus on citizens, is quite broad as the term 'developmental strategies', in particular, can be widely interpreted to include even private and informal initiatives. Mpedi states that '[s]ocial protection embraces social security and entails "policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure to risks, enhancing their capacity to protect themselves against hazards and interruption/loss of income"'.<sup>22</sup> In contrast with Swart's definition, Mpedi, by referring to 'policies and programmes designed to reduce poverty and vulnerability', seems to premise his definition on public measures.

Kabeer describes social protection as referring to 'the full range of interventions undertaken by public, private and voluntary organisations and informal networks to support individuals, households and communities in their efforts to prevent, manage and overcome risks

<sup>18</sup> LG Mpedi *Pertinent social security issues in South Africa* (2008) 7; Swart (n 6 above).

<sup>19</sup> See Committee of Inquiry Into a Comprehensive Social Security System *Transforming the Present – Protecting the Future* (Draft Consolidated Report) March 2002, 41. The Committee was chaired by Prof Vivienne Taylor, hence the term 'Taylor Report' (my emphasis).

<sup>20</sup> Swart (n 6 above) 56D3-56D4.

<sup>21</sup> Sec 27(1) of the South African Constitution guarantees the right to social security for everyone.

<sup>22</sup> Mpedi (n 18 above).

and vulnerabilities'.<sup>23</sup> Sabates-Wheeler and Waite, on the other hand, define social protection as describing<sup>24</sup>

all public and private initiatives that provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks, and enhance the social status and rights of the marginalised, with the overall objective of reducing the economic and social vulnerability of poor, vulnerable and marginalised groups.

The definitions offered by Kabeer and Sabates-Wheeler and Waite are broadly similar and wide in their compass. However, Kabeer's definition specifically points to the role of voluntary organisations and informal networks in the social protection dynamic which the other definitions do not,<sup>25</sup> whilst Sabates-Wheeler and Waite's definition specifically singles out the target groups for the social protection initiatives as the 'poor, vulnerable and marginalised groups' and states that the overall objective is to reduce the 'economic and social vulnerability' of these groups.<sup>26</sup> Thus, both definitions provide important nuances that, together, enrich our ultimate conception of social protection.

Upon a synthesis of the various definitions set out above, in this article social protection is defined as the full range of interventions undertaken by public, private and voluntary organisations and informal networks that provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks, and enhance the social status and rights of the marginalised, with the overall objective of reducing the economic and social vulnerability of poor, vulnerable and marginalised groups and ensuring at least a dignified minimum living standard for all.

### 3 Social protection as a fundamental right: A conceptual framework

This section explores the conceptual framework for social protection as a fundamental human right, focusing on the South African regime, but also with reference to developments elsewhere, particularly the Malawian situation. Along with the definitional section above, it lays the theoretical framework in light of which the specific findings in the following section ought to be gauged.

<sup>23</sup> N Kabeer *Mainstreaming gender in social protection for the informal economy* (2008) 4.

<sup>24</sup> R Sabates-Wheeler & M Waite *Migration and social protection: A concept paper* (2003).

<sup>25</sup> Kabeer (n 23 above).

<sup>26</sup> Sabates-Wheeler & Waite (n 24 above).

### 3.1 Socio-economic vulnerability of migrants

Migration is a century-old phenomenon. People migrate for numerous reasons, including the exploration of new economic opportunities such as jobs, reunification with or joining their families, study, a simple desire for a change of environment, flight from persecution and health grounds. Such movements have become even more pronounced in modern days due to increased globalisation, with better, easier and cheaper means of mobility and communication. In the context of social protection, the Labour Court of South Africa voices it accurately in the case of *Discovery Health Ltd v CCMA and Others (Discovery Health case)*,<sup>27</sup> where Van Niekerk J stated:<sup>28</sup>

Globalisation has had a profound effect on international migration and has increased significantly the number of people who migrate as a means of escaping poverty, unemployment and other social, economic and political pressures in their home countries.

In the *Discovery Health* case,<sup>29</sup> the Court stated that there is a largely unresolved tension between the right of states to protect their labour markets and the protection of fundamental rights of those who, by choice or necessity, seek work in countries other than their own. It proceeded to observe that the ILO had noted that the resulting tension between internal and external forces tended to accentuate further the prejudices, xenophobia and racism of which migrants are often victims.<sup>30</sup>

All these factors play out in characterising migrants as a vulnerable group. This vulnerability is often exacerbated by the fact that migrants are frequently treated as persons outside the political community of the host country, and this entails exclusion from various rights, privileges and amenities accorded to citizens. In the Canadian case of *Andrews v Law Society of British Columbia*,<sup>31</sup> Wilson J explained some vulnerability attributes of migrants within the social polity, stating that<sup>32</sup>

[r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending ...' Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation ... that 'in the absence of its natural defenders, the interests of the excluded are always in danger of being overlooked'.

<sup>27</sup> *Discovery Health Ltd v Commissioner for Conciliation, Mediation and Arbitration & Others Case* JR 2877/06 (unreported, decision of 28 March 2008, Labour Court of South Africa).

<sup>28</sup> *Discovery Health Ltd* (n 27 above) para 45.

<sup>29</sup> As above.

<sup>30</sup> As above.

<sup>31</sup> [1989] 1 SCR 143.

<sup>32</sup> As above.

The judge then proceeded to say that this was a determination which was not to be made only in the context of the law which was subject to challenge, but rather in the context of the place of migrants in the entire social, political and legal fabric of society.<sup>33</sup> South African experiences show that the words of Justice Wilson are as true and applicable in Canada as they are in South Africa today.

Social protection is an agenda for reducing the vulnerability and risk of low-income households with regard to basic consumption and services, and it has become an important part of the development discourse at both national and international levels.<sup>34</sup> Kanyongolo states that social protection is one of the emerging topical issues in current studies in Africa, generally, and Southern Africa, in particular, observing that '[i]ncreasing levels of poverty and calls for the reduction or elimination of poverty and social exclusion have heightened debates on the subject'.<sup>35</sup>

### 3.2 Social protection regime in South Africa

The general protection situation of migrants in South Africa is rather precarious, largely because of the adverse socio-economic conditions that most South Africans face. These conditions received judicial notice and expression in *Soobramoney v Minister of Health (KwaZulu-Natal) (Soobramoney case)*,<sup>36</sup> where the Constitutional Court of South Africa stated that millions of people in the country live in deplorable conditions and in great poverty.<sup>37</sup> The Court enumerated a number of socio-economic problems that continue to beset South African society, including high levels of unemployment, inadequate social security and lack of access to clean water or to adequate health services. It stated that these conditions already existed when the Constitution was adopted and that a commitment to address them, and to transform the South African society into one in which there will be human dignity, freedom and equality, lies at the heart of the new constitutional order. It concluded that for as long as these conditions continue to exist, that aspiration will have a hollow ring.<sup>38</sup> In view of these daunting challenges, it has been observed that for obvious political reasons, the government's focus has fallen squarely on addressing the needs of citizens first, and deferring those of other groups that might be just as vulnerable.<sup>39</sup> The result is that non-nationals 'often "fall through the

<sup>33</sup> As above.

<sup>34</sup> Sabates-Wheeler & Waite (n 24 above).

<sup>35</sup> NR Kanyongolo 'Social security and women in Malawi: A legal discourse on solidarity of care' unpublished PhD thesis, University of Warwick, 2007.

<sup>36</sup> 1998 1 SA 765 (CC).

<sup>37</sup> As above.

<sup>38</sup> As above.

<sup>39</sup> F Belvedere *et al* 'Realising rights: The development of health and welfare policies for asylum seekers and refugees in South Africa' in Handmaker *et al* (n 2 above) 248.

cracks" in national health and welfare systems, and access to appropriate services is not always guaranteed'.<sup>40</sup>

One of the measures put in place in South Africa under the 1996 Constitution to mitigate the impact of the deplorable living conditions and to reduce the vulnerability and risk of low-income individuals or households in the country, is the social security scheme provided for under section 27(1)(c) of the Constitution. Section 27 of the Constitution provides as follows:

- (1) Everyone has the right to have access to –
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

In light of the definition of social protection adopted above, it should be observed that this provision, taken as a whole, is quite strong in guaranteeing social protection as a right in terms that go beyond the usual restrictive compass of state-guaranteed social security. It is one of the hallmarks that distinguish the South African Constitution as broadly transformative of the socio-economic fabric of society, and as one of the most progressive constitutions in the world. The Constitution guarantees these rights for everyone, and some commentators have suggested that the term 'everyone' in section 27(1) of the Constitution means 'everyone', thus including non-nationals.<sup>41</sup> In the case of *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development (Khosa case)*,<sup>42</sup> the Constitutional Court, specifically addressing the right to social security, held that, given that the Constitution expressly provides that the Bill of Rights enshrines the rights of all people in the country, and in the absence of any indication that the rights under section 27(1) of the Constitution are to be restricted to citizens as in other provisions in the Bill of Rights, 'the word "everyone" in this section cannot be construed as referring only to "citizens"'.<sup>43</sup>

At the international level, article 2 of the Universal Declaration of Human Rights 1948 (Universal Declaration) provides that 'everyone, as a member of society, has the right to social security'. It is submitted that membership in this regard has to be understood broadly to mean all persons that are subject to the jurisdiction of the state concerned. It

<sup>40</sup> As above.

<sup>41</sup> M Pieterse 'Foreigners and socio-economic rights: Legal entitlements or wishful thinking?' (2000) 63 *Journal of Contemporary Roman Dutch Law* 51.

<sup>42</sup> 2004 6 SA 505 (CC).

<sup>43</sup> *Khosa* (n 42 above) para 47.

is worth reckoning here that, whilst the Universal Declaration is a non-binding legal instrument in its conception, it has, through widespread state practice and a sense of legal obligation, generally been elevated to a more heightened level of authority where its provisions can no longer simply be neglected as non-binding. Whilst it is certainly not a treaty, it has a *sui generis* character and some of its provisions, at least, have crystallised into norms of customary international law.<sup>44</sup> Its language on social security is therefore highly relevant to South Africa.

Yet another important instrument is ICESCR. Article 9 of ICESCR provides for 'the right of everyone to social security, including social insurance'. Whilst it is significant that South Africa has not yet ratified ICESCR, it is equally significant that this fact notwithstanding, section 39(1)(b) of the Constitution imposes a peremptory obligation on any court, tribunal or forum to consider international law when interpreting the Bill of Rights, and this includes both binding as well as non-binding international law. Thus, ICESCR remains an important instrument in South Africa, even more so because the country signed the Covenant, and also that ICESCR significantly influenced the framing of socio-economic rights provisions under the Constitution.

The African Charter is also fairly significant in this regard. Article 18(4) of the Charter provides that '[t]he aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'. Thus, in the particular case of the elderly and people with disabilities, the African Charter specifically guarantees the right of social protection. A manifest weakness of the African Charter is the omission of other deserving categories for social protection guarantees such as the desperately poor, the unemployed, asylum seekers and refugees. South Africa is a party to, and therefore bound by, the provisions of the African Charter on social protection.

Another important instrument is the 2003 Charter of Fundamental Social Rights in SADC. Article 10 of the Charter states:

- (1) Member states shall create an enabling environment so that every worker in the region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.
- (2) Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and assistance.

Olivier observes that the 'Charter makes comprehensive provision for the establishment of harmonised programmes of social security

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<sup>44</sup> See *Filartiga v Pena Irala* 19 ILM 966 (1980). See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion*, ICJ Reports (1971) (Namibia Opinion) 16; *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase 37 ILR (1966) 243 & 454.

throughout the region'.<sup>45</sup> The Charter contains provisions relating to the social protection of both workers and those who are not employed. He further states that, according to the Charter, state parties are enjoined to create an enabling environment such that every worker in the SADC region shall, regardless of status and the type of employment, have a right to adequate social protection. It further requires that those that are unable to either enter or re-enter the labour market and have no means of subsistence, should receive sufficient resources and social assistance.<sup>46</sup> The faithful implementation of obligations under this Charter would revolutionise the social protection regime in SADC. The import of article 10(1) seems to suggest that no discrimination is allowed with regard to social protection for workers, including migrant workers, irrespective of their immigration status. One problem with this provision is that it ties social protection to employment. Be that as it may, however, it is clear that a large majority of migrants fall into the category of workers and hence the strong relevance of this provision.

In the *Khosa* case,<sup>47</sup> the Constitutional Court was confronted with the question as to whether legislative provisions under the Social Assistance Act 59 of 1992 (since replaced with the Social Assistance Act 13 of 2004), that excluded permanent resident immigrants from accessing social security benefits under section 27(1)(c) of the Constitution, were consistent with the text of the Constitution. The Court declared the impugned provisions unconstitutional. Mokgoro J, delivering the judgment of the Court, stated:

The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.

Millard argues that the *Khosa* case 'signalled a departure from the introspective and nationalistic approach towards social assistance that previously characterised the South African system'.<sup>48</sup> The Social Assistance Act (2004) was passed as a regulatory framework to facilitate the implementation of the right to social security. The Act, however, applies

<sup>45</sup> M Olivier 'Social protection in the SADC region: Opportunities and challenges' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 377-402 386.

<sup>46</sup> Olivier (n 45 above) 386-387.

<sup>47</sup> *Khosa* (n 42 above).

<sup>48</sup> D Millard 'Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community' (2008) 8 *African Human Rights Law Journal* 37 42.

to citizens and permanent residents only.<sup>49</sup> Dekker argues that ‘[a]lthough South Africa has a fairly well-developed social security system for a developing country, the system suffers from many deficiencies’. As an instance, he states that the system ‘is in fact not comprehensive and many categories of people are excluded from its protective scope’. Millard identifies the position of non-nationals as one of the weak aspects of South Africa’s social security system; stating that apart from<sup>50</sup>

some exceptions for foreigners with permanent residence status, non-nationals are generally excluded from social security in South Africa. This is particularly evident in social insurance in South Africa. As far as employment-based schemes are concerned, entitlement to benefits mainly depends on employee-status. It follows that only those who have permanent residence, or whose stay in the country is otherwise legal, may qualify to be ‘employees’ in terms of the unemployment insurance Act or the Occupational Injuries Act.

He then observes that the Road Accident Fund is the only fund that is both not premised on employment, as well as not dependent on the nationality of the claimant.<sup>51</sup>

All in all, it is clear that social protection is a guaranteed fundamental human right in South Africa. The enjoyment of the right, however, as discussed above, is beset with multiple challenges. In light of these challenges, migrants often find themselves in a high-risk and vulnerable situation. Finding coping mechanisms in such an environment against livelihood risks and vulnerabilities in order to enhance their social status and to ensure a decent livelihood in dignity for themselves and their families is bound to be an arduous task. Dekker aptly states that<sup>52</sup>

[i]n order to financially sustain themselves, those not covered by formal social security have developed their own survival strategies. These survival strategies can be labelled as informal social security and exhibit elements of, and reveal similarities to, concepts such as social assistance and social insurance. It can therefore be stated that, in South Africa, formal social

<sup>49</sup> See sec 5(1)(c) of the Act. The Act does, however, grant the Minister responsible powers to prescribe some categories of persons that might also benefit from the provisions of the Act. In the case of *Government of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC), the Constitutional Court of South Africa, elucidating on state obligations in respect of socio-economic rights generally (of which formal social protection measures form part), and the right to housing, in particular, stated that ‘[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality ... Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril should not be ignored by the measures aimed at achieving realisation of the right. [T]he Constitution requires that everyone must be treated with care and concern. If the measures ... fail to respond to the needs of those most desperate, they may not pass the [reasonableness] test’ (para 44).

<sup>50</sup> Millard (n 48 above) 41.

<sup>51</sup> As above.

<sup>52</sup> Dekker (n 8 above) 6.

security and informal social security are both systems which provide social protection.

In the next section, the article analyses some of the findings of the field survey conducted, and draws conclusions against the theoretical framework of social security and social protection in South Africa and Malawi as discussed.

## 4 Findings and analysis

### 4.1 General information

A total of 44 Malawian migrants were interviewed from various areas in Johannesburg. These areas included Johannesburg CBD, Cresta, Randburg, Forsburg, Brixton, Diepsloot, Brixton, Hillbrow, Alexandra, Thembisa, Roodepoort, Mayfair and Melville. In terms of gender, the large majority of respondents were men. Their ages ranged from 18 years (the youngest) to 53 years (the oldest). Most of the respondents were relatively young, in their mid-twenties to early thirties. One thing that is therefore immediately apparent is that most Malawian migrants fall in the most economically-active and productive age group with the most pressing socio-economic obligations.

In terms of family life, a large majority of the respondents were married and had children. Strikingly, the overwhelming majority of the respondents who had children indicated that they had left their children in Malawi. One of the major factors leading to this situation, according to most of them, is the general lack of access to educational facilities in South Africa. This shows a direct link between exclusion of migrants from some forms of social protection with the splitting of families. Such splitting of families implicates the right to family life of the migrants concerned. In the case of *Dawood and Others v Minister of Home Affairs and Others*,<sup>53</sup> O'Regan J observed that the institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of society and bear an important role in the rearing of children,<sup>54</sup> and that although there is no provision in the Constitution guaranteeing the right, a number of constitutional rights might still be implicated and that 'the primary right implicated is ... the right to dignity'.<sup>55</sup> Thus, the right to family life is recognised and protected under the South African Constitution, and the state has an obligation to respect, protect and promote this right. The state therefore is under an obligation to

<sup>53</sup> 2000 3 SA 936.

<sup>54</sup> Para 36.

<sup>55</sup> The right to human dignity is protected under sec 10 of the Constitution of South Africa.

ensure that this right is respected, protected and promoted through its policies and practices.<sup>56</sup>

With regard to levels of education, most of the respondents had a high school education, followed by those with a primary school education, and a relatively small number who had tertiary or higher education. It would therefore appear that most Malawian migrants in Johannesburg are relatively low-skilled people. The findings also, albeit with a small sample, seem to suggest that there is higher unemployment in Malawi, in respect of people with less than tertiary education, than in South Africa, and this largely explains why most of the migrants fall into this education bracket. Following research conducted in South Africa in 2007, Sward and Sabates-Wheeler found that, upon comparison of the socio-economic conditions of Malawians who had migrated to the United Kingdom with those that had migrated to South Africa, '[t]here were significant socio-economic differences between the two groups ... as those who migrated to South Africa were typically from poorer families and had lower levels of education and occupational status than those who moved to the UK'. This study therefore confirms these previous research findings in so far as the socio-economic conditions of the average Malawian migrant in Johannesburg are concerned.<sup>57</sup>

The result is that due to their low socio-economic station in life, most Malawian migrants in Johannesburg are very prone to socio-economic shocks and hence in need of social protection avenues to hedge against the risks and vulnerabilities in this regard. It is therefore pertinent that this study explores the social protection avenues that they have.

#### 4.2 Residence status

Malawians living in Johannesburg fall into various residence categories. Although a large majority of Malawian migrants in the study were staying in Johannesburg on expired one month visitors' permits, there was still a significant representation of those in other residence categories. These included permanent residents, work permit holders, study permit holders, visitors' permit holders (for dependants of those on either work or study permits), asylum seekers and recognised refugees. For those on expired one month visitors' permits, some of these permits had been expired for several years. No respondent, however, indicated that they had entered South Africa illegally or undocumented. In relation to those that claimed to be asylum seekers or recognised refugees, it is interesting that when the respondents were asked the reasons for coming to South Africa, none indicated that they fled from actual or potential persecution in Malawi which would ground a claim for

<sup>56</sup> Sec 7(2) of the Constitution.

<sup>57</sup> J Sward & R Sabates-Wheeler 'Social protection of migrants from the global south: Protection gaps and strategies to "self-insure"' Development Research Centre on Migration, Globalisation and Poverty: Briefing Paper 14 (2008) [http://www.migrationrc.org/publications/briefing\\_papers/BP14.pdf](http://www.migrationrc.org/publications/briefing_papers/BP14.pdf) (accessed 12 March 2009).

refugeehood. On further engagement with some of the 'asylum seekers', it emerged that they simply adverted to the asylum procedure in order to regularise their stay in South Africa and to be able to secure more formal and better jobs.

Thus, it appears that the asylum procedure is being used by some migrants as a way of mitigating the effects of the socio-economic exclusions that they face, in addition to using the procedure as a hedge against deportation. It, however, needs to be emphasised that, considering that this was a relatively small sample survey, there might be some Malawian migrants who have genuine asylum claims within the terms of the Refugee Act of 1998.

#### 4.3 Reasons for migration

As stated above, the overwhelming majority of respondents cited economic hardships in Malawi, in particular scarcity of jobs or very poor pay in instances where they were previously employed, as reasons for migrating to South Africa. There was a general feeling that life in South Africa was better than in Malawi. Most of the migrants already had networks such as friends or relatives in South Africa when they migrated. The other reasons for coming to Johannesburg were to join family and to study. A few indicated that they had previously been deported and had returned to South Africa. They cited as reasons for their return the harsh economic conditions in Malawi that were comparatively much worse than in South Africa, even after factoring in all the risks and vulnerabilities associated with being an African foreigner in South Africa.

In summary, therefore, it may be concluded that most of the Malawian migrants moved to South Africa as a social protection strategy.<sup>58</sup> This is also illustrated further by the regular remittances they send to Malawi, and investments that they are making pending their return. This is consistent with Bloch's statement that migration to South Africa is a well-established household poverty reduction strategy in Southern Africa,<sup>59</sup> as well as Dekker's proposition that informal social protection arrangements rely heavily on principles of reciprocity and solidarity between those in the sending region or country, and those in the host region or country.

#### 4.4 Duration of stay

Most of the respondents were fairly new migrants to South Africa, and a large proportion had been in the country for less than two years. Regarding their plans of staying in South Africa, many respondents indicated that their intentions of staying in South Africa were short term only. As shown earlier, most indicated that they had left their

<sup>58</sup> Sabates-Wheeler & Waite (n 24 above).

<sup>59</sup> Bloch (n 1 above).

families behind and that their reason for coming to South Africa was to accumulate sufficient funds or resources that would provide them with a stepping stone for running businesses and leading a good life back in Malawi. A permanently resident respondent, John Phiri,<sup>60</sup> interestingly indicated that he also had only short-term plans of further stay in South Africa. He stated:

My ID indicates that I am a non-citizen of RSA and that has led to my being denied opportunities of different types on many occasions. My lack of strong command of local languages also contributes to similar instances. I therefore do not plan on staying in South Africa for much longer. Although savings are generally impossible from my modest income, I am starting off slowly with a small business to raise funds, and I have already acquired land in Malawi.

His statement similarly reveals that his stay in South Africa is largely a social protection strategy. It also shows the existence of xenophobic undercurrents that even occasion social exclusion of permanently resident migrants from various services in the country to which they are legally entitled.

#### 4.5 Access to employment and conditions of work

A large majority of the respondents were employed in the informal sector, while a few others indicated that they were self-employed. No respondent, however, said that they were unemployed. It would therefore appear that the level of unemployment among Malawian migrants in the city is significantly low. However, a large majority indicated that they had previously experienced unemployment. As a coping strategy during such hard times, with a few exceptions that indicated that they had to struggle by themselves, the overwhelming majority indicated that they were supported by relatives, friends or both during such periods. This is characteristic of informal social assistance as a form of social protection, and fits into the description of informal social security as discussed by Dekker and Olivier and others above. Thus it emerges, consistent with Dekker and Olivier's propositions, that these informal social protection avenues are two-pronged: (a) community-based (friends); and (b) kinship-based (relatives).

Very few among those employed, and these were exclusively those employed in the formal sector, indicated that they had concluded formal contracts or any form of written employment contract with their employers. Most complained of being underpaid as compared to South Africans doing the same job. When asked why they could not demand better pay or fair and equal treatment, the reply was that they were foreigners with no proper immigration papers and hence they could be summarily dismissed and/or reported to the police for deportation at any time if they made such attempts.

<sup>60</sup> Not his real name.

The few who indicated that they had concluded formal contracts and that their employers complied with equal treatment labour laws were the more highly-educated ones with proper immigration permits. Upon further interrogation, none of the respondents indicated that they belonged to any form of labour union. Most either feared that they would not be admitted to membership by reason of not having proper immigration papers, or they feared that they would be summarily dismissed by their employers once it was discovered that they had joined a labour union since they had no proper immigration documents. A permanently resident migrant, addressing the same issue, said that 'perhaps as a non-citizen, there is this sense of not belonging'.

Thus, the findings generally revealed that the illegal residence status for most of the migrants exposed them to exploitation on the labour market, and exclusion from participation in some activities necessary to protect or promote their rights, such as participation in labour or trade union activity. The general 'sense of not belonging' brought out by the permanently resident respondent above, however, also reveals that some of the exclusions are the result of more complex social phenomena other than simple issues of residential or immigration status. They pervade the general experience of the migrant and seem deeply rooted in xenophobic attitudes prevalent in the host society as well as perhaps a lack of motivation or will to integrate on the part of the migrants.

A general lack of knowledge about their rights is another factor that significantly contributes to the exploitative labour practices that they are subjected to. For instance, none of the respondents were previously aware that they could as well present an employment dispute with an employer to the Commissioner for Conciliation, Mediation and Arbitration (CCMA) irrespective of their immigration status in the country. An illustrative case on this point is the *Discovery Health* case,<sup>61</sup> where the Court held that the CCMA had jurisdiction on various grounds. Among other things, it held that if section 38(1) of the Immigration Act, 2002 were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it would not be difficult to imagine the inequitable consequences that might flow from the provision, particularly when persons without the required authorisation accept work in circumstances where their life choices are limited and where they are powerless on account of their unauthorised engagement to initiate any right of recourse against those who engage them.<sup>62</sup>

This passage particularly resonates with the circumstances in which most of the respondents in this survey found themselves. The Court

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<sup>61</sup> See n 27 above.

<sup>62</sup> *Discovery Health* case (n 27 above) para 30.

was mindful that others would interpret its position as condoning its illegality and justified itself by saying, among other things, that<sup>63</sup>

[i]f employers were aware that foreign nationals who do not have work permits had rights of recourse to the LRA and the BCEA (and thereby to CCMA and to this Court) they would be less likely to breach s 38(1) of the Immigration Act by entering into contracts in these circumstances.

As much as the position taken by the Court in this case is such that it might eventually lead to declining job opportunities for illegally-resident foreign migrants in South Africa, what it does is to affirm that once employed, foreign migrants are entitled to labour law protection just like any other employee in the country. Interpreted liberally, this position at law could even assist such employees to recover their employment dues and have them sent to them in their home countries in the event of deportation.

A number of Malawians personally known to the author have previously been deported from South Africa and all of them state that it is practically impossible to recover their outstanding employment dues once deported, and frequently they forfeit all their property acquisitions, except in a few cases where friends or relatives are able to organise to send the property to the owner in Malawi. They were unaware of any formal protective measures they could take. A lack of knowledge therefore excluded them from formal social protection, albeit very limited, legally available to them under South African law.

#### 4.6 Access to health care

Access to health care services is a constitutional right in South Africa, and is guaranteed for everyone.<sup>64</sup> Further, the Constitution provides in section 27(3) that no one may be refused emergency medical treatment. Thus, from a constitutional standpoint, both the more general right of access to health care services and the specific right to emergency medical treatment are guaranteed for everyone irrespective of status such as nationality or immigration status.

From the survey, a large majority of the respondents stated that they benefited from or had access to free health services in Malawi. This was in sharp contrast with their experiences in South Africa as most of them indicated difficulties in accessing the public health care system. Thus, only a few indicated that they were able to access public health services at a small fee, but they complained that they faced xenophobic hostility from health care personnel. Some indicated that they had been turned back from public hospitals by reason of a lack of South African identity documents. From a constitutional perspective, it seems clear that a denial of access to health care services on account of a lack of a South African identity document or a

<sup>63</sup> *Discovery Health* case (n 27 above) para 33.

<sup>64</sup> See sec 27(1)(a) of the Constitution.

valid permit is inconsistent with section 27(1)(a) of the Constitution. The study here also reveals a significant lack of knowledge of their rights among Malawian migrants in this regard. Many respondents indicated that in the event of illness or other need for health-related attention, they resorted to private clinics and that, normally, where someone is in financial need, friends and relatives contribute towards the cost of treatment. This practice is illustrative of an extensive and well-established pattern of informal networks of social assistance based on nationality and kinship, as a survival strategy and hence a form of social protection in an environment of exclusion from access to health care.<sup>65</sup>

It is apparent, however, that the practice of refusing foreign migrants who do not possess valid South African identity documents access to health care services is not officially sanctioned by the authorities. Thus, in a memorandum from the National Department of Health in Pretoria, dated 15 February 2007, the Department advised provincial departments that

[p]atients should not be denied ART [anti-retroviral treatment] because they do not have an ID if all issues affecting adherence have been addressed and the treatment team is convinced that the patient stands to benefit from the intervention.

It appears, however, that the practice of exclusion on account of identity documents continued, at least in the Gauteng region, prompting the Gauteng Department of Health to issue another memorandum to hospitals and health care providers dated 4 April 2008, stating that it had come to its attention that the practice of excluding undocumented or irregular migrants from public health care services was continuing and that it was 'not acceptable'. A directive was therefore issued that 'no patient should be denied access to any health care service, including access to anti-retrovirals irrespective of whether they have a South African identification document or not'. From this survey, however, it would appear that such exclusions from access are still continuing. As other commentators have said, '[a]s with many aspects of these debates on rights entitlement, the policy may look good, but it simply does not translate well in practice'.<sup>66</sup> Landau criticises these exclusionary practices, stating that '[p]roviding health care for refugees, asylum seekers and other non-nationals is a critical public health concern', and arguing that the 'denial of health care can lead to the spread of infection and disease to migrants and communities in which they live. Apart from being a violation of human

<sup>65</sup> Dekker (n 8 above).

<sup>66</sup> See Belvedere *et al* (n 39 above).

rights and dignity, illness potentially limits the contributions of all South Africans.<sup>67</sup>

#### 4.7 Access to education

Section 29 of the Constitution guarantees everyone the right to basic education, including adult basic education. Further, the South African Schools Act<sup>68</sup> provides for compulsory school attendance for children between the ages of seven and 15 years. Section 3(1) of the Act imposes a duty on every parent (including a guardian) to cause every learner within that age bracket for whom he or she is responsible to attend school from the first day of the school year. In addition, section 5(3)(a) of the same Act provides that '[n]o learner may be refused admission to a public school on the grounds that his parent is unable to pay or has not paid ... school fees'. From these provisions, it is clear that the law requires all children of the defined school-going age to attend school. This includes migrant children.

The study reveals that, just as in the case of access to health services, most Malawian migrants in Johannesburg (or their children and/or dependants) have previously benefited from the free primary education policy of the Malawian government. By contrast, they reported that their South African experience was fundamentally different with no respondent indicating that they had access to free primary education. Only a small number indicated that their children could access fee-based public education or private education. In fact, it emerged that exclusion from the public education system, and the high cost of enrolment in the few private schools that permit admission irrespective of residence permit documentation, largely explain the large number of respondents interviewed who indicated that their children were attending school in Malawi. It is interesting that, whilst most respondents are able to access at least private health care in South Africa irrespective of the status of their stay in the country, it is very difficult for them to enrol their children in schools, including private schools. On further interrogation, a number of respondents indicated that, whilst it is possible for children to be admitted to some private schools, they still needed a formal South African identity document in order to be registered for purposes of the matric examinations. Thus, some stated that their children had been forced to change surnames so as to appear as if they are children of either South Africans or Malawians with South African identity documents.

It is submitted that changing or the prospect of changing children's identities under these circumstances clearly violates their rights to a given name and human dignity. Thus, access to education

<sup>67</sup> LB Landau 'Regional integration, protection and migration policy challenges in Southern Africa' in Handmaker *et al* (n 2 above) 37.

<sup>68</sup> Act 84 of 1996.

for undocumented immigrants in South Africa, or the lack thereof, appears to be a major exclusion for Malawian migrants from one of the essential elements of the ‘basic social security package’ within the social protection framework.<sup>69</sup> The exclusion seems to be a matter of practice/implementation, rather than normative (that is, as a result of law or state policy). It is a practice that violates, among others, the provisions of the South African Schools Act of 1996.

Universal free primary education has become increasingly recognised as a fundamental and non-derogable right in the international arena. It is therefore strongly recommended that the South African government urgently institutes an inquiry into the question as to the accessibility of basic education for migrant children in South Africa, with a view to ensuring that there is, in practice, universal and compulsory basic education for all children as provided for in the Constitution, the South African Schools Act, as well as international treaties such as the Convention on the Rights of the Child of 1989 (CRC).

#### 4.8 Safety net social assistance

Safety net grants, for purposes of the survey, included child protection grants, disability grants, old age grants and other direct financial or material provisioning from the state with regard to social security. In the South African context, these are generally provided for under section 4 of the Social Assistance Act of 2004. All of the grants mentioned in section 4 are tied to citizenship and, with the decision in the *Khosa* case, they extend to permanent residents. However, there is provision for the Minister to make exceptions under section 5(1)(c) of the Act, with the concurrence of the Minister of Finance, and to extend the application of the Act to other groups or categories of persons. In addition, section 13 of the Act provides that the Minister may provide social relief of distress to a person who qualifies for such relief as may be prescribed. Again this provision is not couched in terms that restrict its application to citizens (and permanent residents).

In terms of the survey, no respondent had been able to access the child support grant either in Malawi or South Africa. These provisions are simply not available in Malawi, whether by requirement of law or through deliberate government policy. It is worth mentioning, however, that under the Children and Young Persons Act,<sup>70</sup> there is provision for what are referred to as approved schools that were set up to, among other things, provide for the reception, education and vocational training of children in need of care and protection.<sup>71</sup> This is a form of social protection for children, but it is noteworthy that access

<sup>69</sup> See ILO (n 3 above).

<sup>70</sup> Cap 26:03 Laws of Malawi.

<sup>71</sup> Secs 34 & 35 of the Act (n 70 above).

is very limited as there is only one such school at present.<sup>72</sup> In South Africa, on the other hand, the state has a scheme for the provision of social assistance grants such as child support, disability and old age grants. Malawian (and other) migrants, however, with the exception of permanent residents, are excluded from the scheme. In the survey herein, all the respondents stated that they did not and could not benefit from the social assistance schemes on account of nationality. Such exclusion is attributable to statutory requirements that limit the right to social security for everyone as guaranteed under section 27(1)(c) of the Constitution, by excluding all non-nationals, apart from permanent residents, from accessing these and other social security grants. In addition, the only permanent resident interviewed was a middle-class income earner who did not qualify for the grants according to the means criteria for accessing the grants. No person with disabilities or elderly person (of the age that qualified for such grants) was interviewed or responded to the questionnaire. However, a number of interviewees indicated that in so far as one does not have a South African identity document, it is practically impossible for one to access any of the social security grants. However, as has been shown above, there are some flexibilities built into the Social Assistance Act based on which the Minister may make social protection provision for groups of migrants in need or in distress. It would appear that it was on the basis of these flexibilities that the South African government made provision for the victims of the xenophobic attacks of May 2008. However, the problem with reliance on such ministerial discretion is that it does not amount to a claimable right on the part of the migrants. It seems to be a measure that would be dependent on, amongst others, agitation from lobby groups.

In Malawi, by contrast, there is no scheme of social assistance grants for people with disabilities. However, under the Handicapped Persons Act,<sup>73</sup> free education and vocational training is provided to people with disabilities under the auspices of the Malawi Council for the Handicapped (MACOHA) that is established under the Act. Upon completion of their training, MACOHA provides the trainees, when funds permit, with starter pack tool kits to assist them to start small-scale skills-based businesses. This, it is submitted, is an important social protection measure for people with disabilities, which generally migrant workers with disabilities in South Africa might not get unless they acquire permanent residence status. The weakness with the MACOHA scheme is that it is rather irregular due to insufficient and unstable funding from government. It would appear that a major problem is the lack of a rights-based approach to the importance of MACOHA on the part of the Malawi government.

<sup>72</sup> Chilwa Approved School in Zomba.

<sup>73</sup> Cap 33:02 Laws of Malawi.

All in all, it would appear that formal social protection provisioning for Malawian migrants is almost as non-existent in practice in South Africa as it is in Malawi. The difference lies perhaps in the fact that the informal networks that provide informal social protection are more sustainable in Malawi due to a wider network of the extended family than they are in South Africa where the connection is largely community (nationality)-based rather than stronger kinship-based systems.

#### 4.9 Social protection in situations of desperate need

Under this heading, the study sought to ascertain whether the respondents were aware of any measures that the South African government takes or might take in the event that they find themselves in circumstances of desperate need. None of the respondents indicated that they had access to any government safety net scheme designed to mitigate the impact of extreme poverty or any circumstances of desperate need in South Africa. Such situations include unemployment, homelessness, hospitalisation and funerals, among others. The same was generally said about the respondents' experiences in Malawi. As a way of dealing with this challenge, most of the respondents indicated that when such a situation occurs, or if it is to occur, they fall or would fall back on informal family or community networks of Malawians who normally help out until the situation improves. In the event of the problem persisting, for instance unemployment because of illness, the common practice, according to most interviewees, is to send them back to Malawi. This is consistent with Dekker's assertion that informal social security is not in itself sustainably reliable and that it necessarily needs to be augmented with formal measures. Only a few respondents, however, indicated that they belonged to informal but well-organised associations, to which they make regular modest contributions, and that when adverse situations arise, these associations assist.

A few others indicated that they would either rely on personal savings to deal with any such situation, or that that they were not sure as to the strategy they would adopt in such a situation.

It is submitted, however, that according to the reasonability test set by the Constitutional Court in the *Grootboom* case,<sup>74</sup> government policies that exclude provision for migrants who are in situations of desperate need, irrespective of their immigration status, are unreasonable and hence fall foul of section 27(1)(c) of the Constitution.<sup>75</sup>

#### 4.10 Remittances and investments

The overwhelming majority of respondents indicated that they sent money (remittances) to Malawi, albeit at widely varying intervals,

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<sup>74</sup> n 49 above.

<sup>75</sup> As above.

ranging from monthly to yearly or upon request, among others. The money is sent for varying purposes, including general support of their family members, investment purposes such as buying land or building houses, and maintaining savings in Malawi, either to hedge against the prospect of deportation that normally results in migrants forfeiting all their property and savings in South Africa, whilst others were simply accumulating savings so that they would have finances to enable them to pursue a decent livelihood upon return to Malawi since most of them did not have long-term intentions of settling in South Africa. The overall picture thus further exemplifies the fact that migration to South Africa is a well-established social protection strategy for many Malawians.

Sabates-Wheeler and Waite state that '[t]he economics of migration literature provides a framework for understanding how migration may be conceptualised as a social protection strategy ... insurance and investment [are] the two main alternative motivations for migrants to send remittances back to their families'.<sup>76</sup>

From the above findings on remittances it is clear that the respondents are seeking to self-insure in the event of a shock such as sudden deportation, or to invest as a way of reducing poverty and its associated vulnerabilities or simply to enhance their living standards.

## 5 Conclusion

This article has shown that the primary reason for the migration of most Malawian migrants to Johannesburg is the search for jobs and other economic opportunities. The article demonstrates that most Malawian migrants are either unskilled or semi-skilled and thus very vulnerable to socio-economic shocks. This exposes them to risks that require proper social protection measures to hedge against. The study has further revealed that there are both institutionalised/formal, as well as practical, exclusions of Malawian migrants in Johannesburg from the provision of basic social security. Institutionalised/formal exclusions are manifested through such schemes as social assistance. Practical exclusions are manifested in areas such as access to public health care services and access to public education where, notwithstanding otherwise inclusive legislation, the practical experience for most migrants is that of exclusion. The result is that migrants generally fall back on informal social assistance networks in order to survive in hard times. This is in sharp contrast with the experiences of these migrants when in Malawi, particularly in the areas of access to health and basic education. In the *Khosa* case, the Court recognised the existence of these informal social protection networks, stating that the exclusion of people 'in need of social-security programmes forces them into relationships of

<sup>76</sup> Sabates-Wheeler & Waite (n 24 above).

dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. These families or dependants ... may be in need of social assistance themselves.<sup>77</sup> The Court further observed that the denial of welfare benefits therefore impacted not only on those without other means of support, but also on the families, friends and communities with whom they have contact.<sup>78</sup> The Court's analysis is borne out by the survey findings as most of the people who provide welfare in the event of a fellow migrant finding himself or herself in desperate need are themselves very low income earners who are very vulnerable to socio-economic shocks and risks. There is also extensive formal exclusion of these migrants from the provision of contingency-based assistance for the ultra-poor or vulnerable, such as child support, disability and old-age grants, as well as social relief of distress. However, it was found that none of the respondents had access to these in Malawi either.

As a way of preventing threats to livelihood security, Malawian migrants generally tend to build social networks that provide a form of informal social insurance and/or assistance. These, in the short term, seem to provide relatively effective coping social protection strategies in difficult times. They are, however, not sustainable in the long term. In addition, most of the migrants send remittances back to Malawi that serve various purposes. These include supporting families left behind, personal investments as a way to self-insure against the shock of deportation, and medium to long-term investments for the future. Thus, this falls within Sabates-Wheeler's paradigm of the dichotomous dimensions of social protection in the context of migration, namely, migration as a phenomenon that exposes the migrant to risks and vulnerabilities necessitating appropriate hedges, and migration as a social protection strategy to reduce pre-existing poverty or economic-related risks and vulnerabilities in home countries, in the instant case, Malawi.<sup>79</sup>

Whilst this study has focused on South Africa and Malawi, and specifically addressed the situation of Malawian migrants in Johannesburg, a couple of points are worth making: First, as eloquently expressed by Dekker, informal social security frameworks are generally uniform in East and Southern Africa, and this in turn entails that findings from country-specific studies still have strong relevance in other countries in the region.<sup>80</sup> In this regard, there is everything to suggest that the informal social protection strategies adopted by Malawian migrants in Johannesburg are generally applicable to other migrant groups both in South Africa and elsewhere in East and Southern Africa. Secondly,

<sup>77</sup> *Khosa* (n 42 above) para 76.

<sup>78</sup> As above.

<sup>79</sup> *Sabates-Wheeler & Waite* (n 24 above).

<sup>80</sup> Dekker (n 8 above).

some of the problems facing migrant workers, such as a general lack of portability of social security benefits for non-nationals, are common throughout the region.<sup>81</sup> The ESCR Committee has specifically emphasised the obligation on the part of states to ensure that such benefits are portable.<sup>82</sup>

The article also demonstrates that, whereas in South Africa the social protection frameworks for the elderly and people with disabilities are formalised and institutionalised, consistent with the requirements under article 18(4) of the African Charter, the situation in Malawi remains rather tenuous. Whilst some formal provision is made in respect of people with disabilities under the Handicapped Persons Act, the provision remains largely unsatisfactory. In respect of the elderly, no specific provision is made in terms of social protection.

The position in Malawi is similar to that obtaining in many African states. What emerges therefore is that South Africa, with all its social protection weaknesses as discussed in this article, remains a pacesetter on the African continent in setting up normative standards that demonstrate a commitment to taking progressive steps towards the full realisation of social protection generally, and most specifically for marginalised groups such as the elderly and people with disabilities. South Africa's approach is broadly consistent with its social protection obligations under the Universal Declaration and the African Charter, among other important instruments, and it sets a good example for Africa.

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<sup>81</sup> Millard (n 48 above).

<sup>82</sup> ESCR Committee General Comment 19 (n 17 above) paras 36-38.